No. 02-1055

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, Warden,

Petitioner,

v.

WILLIAM CHARLES PAYTON,

Respondent.

ON PETITION FOR WRIT OF PROHIBITION TO THE CALIFORNIA SUPREME COURT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioner Jeanne Woodford, Warden, California State Prison at San Quentin [hereinafter the State], respectfully submits this reply to Respondent William Charles Payton's Opposition to Petition for Writ of Certiorari. Pursuant to rule 15.6, the State addresses only new points raised in Payton's opposition brief.

a. The Ninth Circuit's Holding That California's "Catch-All" Mitigation Instruction Is Unconstitutional As Applied To Post-Crime Evidence In Mitigation Directly Contravenes This Court's Holding In *Boyde*

Payton argues certiorari should not be granted because the Ninth Circuit's holding that California's "catch-all" mitigation instruction was unconstitutional as applied to post-crime evidence in mitigation, which conflicts directly with this Court's decision in *Boyde*, was not "material" to the Ninth Circuit's decision. (Opp. at 1, 9-10.) He maintains, "The failure of California's 'unadorned' 'catch-all' instruction to facially authorize consideration of post-crime evidence was only one of several factors analyzed by the circuit." (Opp. at 2.)

To the contrary, the Ninth Circuit's determination that the "catch-all" instruction was unconstitutional as applied to post-crime evidence in mitigation is the cornerstone of the Ninth Circuit's decision and its analysis of whether there was a reasonable likelihood the jury understood the "catch-all" mitigation instruction so as to preclude consideration of Payton's post-crime evidence in mitigation. Notwithstanding the principle basis upon which Payton relies in support of his claim that the jury did not consider his post-crime evidence in mitigation is his assertion of prosecutorial misstatement, the Ninth Circuit expressly disavowed basing its decision on prosecutorial misstatement or the trial court's response thereto. (App. A at 23-24.) Instead, the Ninth Circuit held: "Standing alone, the factor (k) instruction is unconstitutional as applied to post-crime evidence" and granted habeas relief on that basis. (App. A at 29, 46 (emphasis added).)

Further, as a result of its conclusion that the "catch-all" instruction did not allow for consideration of post-crime evidence in mitigation, the Ninth Circuit found that "there was an absence of instruction" from the trial court concerning the consideration of Payton's post-crime evidence in mitigation. (App. A at 31-33.) The Ninth Circuit's holding contradicts this Court's express holding in *Boyde* that California's "catch-all" mitigation instruction was constitutionally adequate to permit consideration of non-crime related evidence in mitigation. Contrary to Payton's contention, there is no valid basis for limiting *Boyde* to pre-crime evidence, as the Ninth Circuit did.

> Once one acknowledges, as the Supreme Court did in *Boyde*, that factor (k)'s text allows for consideration of evidence beyond the crime itself, there is no logical reason to believe that post-crime character strengths are any less capable of extenuating the gravity of the crime than pre-crime character strengths or are any more excluded from a reading of factor (k).

(App. A at 57-58 (Tallman, J., dissenting, joined by Kozinski, J., T.G. Nelson, J., Fernandez, J. and Trott, J.).)

The Ninth Circuit's finding that there was an "absence of instruction" further contradicts this Court's conclusion that the additional jury instructions to consider "all the evidence," given to both Payton and Boyde's jury, made it "more improbable that jurors would arrive at an interpretation that precludes consideration of all *non-crime related* evidence." *Boyde*, 494 U.S. at 383-84 (emphasis added). In that regard, Payton's contention that the Ninth Circuit's decision "fastidiously follows *Boyde* in every respect," is without basis in fact or logic. (Opp. at 2.)

Because this "catch-all" mitigation instruction provides for consideration of any non-crime related evidence in mitigation, the Ninth Circuit's additional requirement that the State instruct Payton's jury "that it must take Payton's post-crime mitigation evidence into account" is not merely a recognition of this Court's decisions in *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) and *Penry v. Johnson*, 532 U.S. 782 (2001), as argued by Payton. (Opp. at 2.) It is precisely the type of micro-managing of a state's sentencing scheme that this Court has expressly rejected. *Buchanan v. Weeks*, 522 U.S. 269, 276 (1998). Further, if the Ninth Circuit's reasoning in *Payton* is correct and allowed to stand, a state may be required to give specific instructions for each type of mitigation evidence offered. That would mean that *Boyde* does not mean what it says, that is, that California's "unadorned" factor (k) instruction is a "catch-all" mitigation instruction which is constitutionally adequate to give effect to any non-crime related evidence in mitigation.

Payton attempts to avoid the Ninth Circuit's direct conflict with this Court's decision in *Boyde* by raising factual distinctions. (Opp. at 11.) The factual distinctions are inconsequential and do not alter the inescapable conclusion that the Ninth Circuit found unconstitutional the identical instruction that this Court found constitutional in *Boyde*. In

other words, as Payton correctly notes in his opposition, the State is arguing "that this Court in *Boyde* held that California's former 'catch-all' mitigation instruction passes constitutional muster under every factual circumstance." (Opp. at 1.) The Ninth Circuit's conclusion to the contrary merits a grant of certiorari by this Court.

b. The State's *Teague* Claim Is Both Timely Asserted And Meritorious

The State did not waive it's *Teague* claim. The State asserted *Teague* at the first opportunity. Until the en banc decision of the Ninth Circuit, Payton did not argue and no court had determined that the "catch-all" mitigation instruction was unconstitutional as applied to post-crime evidence in mitigation, and that an additional specific instruction was required concerning the consideration of post-crime evidence in mitigation. Indeed, in rejecting Payton's claim that the jury was precluded from considering his post-crime evidence in mitigation, the California Supreme Court and the three judge panel of the Ninth Circuit specifically acknowledged the holding in *Boyde* that California's "catch-all" mitigation instruction was constitutional and permitted consideration of Payton's post-crime evidence in mitigation. (App. E at 195; App. C at 93-94, 97.) Likewise, the United States District Court, the first court to reverse the penalty phase, did not do so on the basis of instructional error but on the ground of prosecutorial error. (App. D at 157 ("The penalty phase of Payton's trial was rendered fundamentally unfair by the prosecutor's improper argument regarding the jury's consideration of mitigation evidence.").) Thus, until the en banc decision of the Ninth Circuit, there was no basis for asserting *Teague*.

Even assuming, arguendo, there was an earlier opportunity at which the State could have asserted *Teague*, the State did not waive its *Teague* claim. This Court has the discretion to entertain the State's assertion of *Teague*. *Schiro v. Farley*, 510 U.S. 222, 229 (1994). The

cases relied upon by Payton in support of his claim of waiver are distinguishable. In *Godinez v. Moran*, 509 U.S. 389, 397 n.8, the petitioner did not raise a *Teague* defense in the lower courts or in his petition for certiorari. In *Hopkins v. Reeves*, 524 U.S. 88, 94 n.3 (1998), the petitioner waited until the Petition for Writ of Certiorari to assert its *Teague* claim even though the "new rule" was asserted by the respondent as early as state court collateral proceedings. In contrast, the State in Payton's case promptly asserted *Teague* at the first opportunity in a Petition for Rehearing to the en banc court and again in its Petition for Writ of Certiorari.

Additionally, contrary to Payton's contention, the Ninth Circuit's holding that California's "catch-all" mitigation instruction is constitutionally inadequate as applied to post-crime evidence in mitigation, and that Payton's jury must be affirmatively instructed "that it must take his post-crime evidence into account," "breaks new ground" and "imposes a new obligation on the States." Prior to *Payton*, California and federal courts uniformly held that, based on *Boyde*, California's "catch all" mitigation instruction was constitutional because it allowed for consideration of non-crime related evidence in mitigation. (Pet. at 18-20.) Also, this Court has repeatedly declined to require a state to structure in a particular way the manner in which juries consider mitigation. (*Buchanan v. Weeks*, 522 U.S. at 276.) Given the state of the law at the time the California Supreme Court affirmed Payton's judgment, the Ninth Circuit's holding that the "catch-all" mitigation instruction was unconstitutional as applied to post-crime evidence in mitigation and that the State must provide an additional instruction that Payton's jury must take into account Payton's post-crime evidence in mitigation was manifestly not "compelled" or "dictated." To the contrary, the en banc Ninth Circuit's holding conflicts with this Court's decision in *Boyde*. Thus, the

Ninth Circuit's holding constitutes a "new rule" under *Teague*. *Graham v. Collins*, 506 U.S. 461, 467 (1993).

Again, Payton attempts to side-step the new rule and contrary holding of the Ninth Circuit by characterizing it as immaterial to its ultimate decision to reverse Payton's death penalty. (Opp. at 14.) A direct conflict with this Court's precedent, which was the basis for reversal of Payton's death penalty, is anything but immaterial.

Certiorari should be granted because the Ninth Circuit's decision in *Payton* constitutes a "new rule" which the Ninth Circuit improperly failed to address.

c. The AEDPA Should Apply And Would Substantially Alter The Ninth Circuit's Analysis

Payton contends certiorari should not be granted on the question of whether the AEDPA applies because the result would be the same nonetheless. (Opp. at 15.) Given this Court's grant of certiorari in *Woodford v. Garceau*, __ U.S. __, 123 S. Ct. 32 (No. 01-1862), the question of whether the AEDPA applies to a petition for writ of habeas corpus filed after the AEDPA's operative date where a petitioner filed requests for counsel and stay of execution prior to the AEDPA's operative date, is clearly worthy of review.

Moreover, Payton's suggestion that there is no meaningful difference between pre- and post-AEDPA standards of review, is a mistake which this Court has recently and repeatedly had to correct. See *Lockyer v. Andrade*, ___ U.S. ___, 123 S. Ct. 1166 (2003), *Ewing v. California*, ___ U.S. ___, 123 S. Ct. 1179 (2003), *Early v. Packer*, ___ U.S. ___, 123 S. Ct. 362, 365 (2002) (per curiam) and *Woodford v. Visciotti*, ___ U.S. ___, 123 S. Ct. 357 (2002) (per curiam). This Court's observations in *Visciotti* are equally applicable here:

> An "*unreasonable* application of federal law is different from an *incorrect* application of federal law." *Williams*, *supra*, at 410, 120 S. Ct. 1495; see *Bell*,

> *supra*, at ___, 122 S. Ct., at 1851-1852. The Ninth Circuit did not observe this distinction, but ultimately substituted its own judgment for that of the state court, in contravention of 28 U.S.C. § 2254(d).

Visciotti, 123 S. Ct. at 360. Contrary to Payton's contention, it is not reasonable to conclude that the Ninth Circuit's decision would be the same if it correctly applied the deferential standard of review set forth in the AEDPA.

Lastly, Payton's half-hearted attempt to analyze this case under the AEDPA does not demonstrate a basis for denying certiorari, but rather Payton's fundamental misunderstanding of the standard of review under the AEDPA. Payton merely disagrees with the California Supreme Court's determination that the "catch-all" mitigation instruction allows for a jury to consider post-crime evidence in mitigation. (Opp. at 15-16.) He does not, because he cannot, show the California Supreme Court's decision was contrary to or an unreasonable application of *Boyde*. Indeed, under Payton's interpretation of *Boyde*, i.e., that it does not address consideration of post-crime evidence in mitigation (Opp. at 10), *Boyde* would not constitute clearly established federal law on the question of whether the "catch-all" mitigation instruction allowed for consideration of post-crime evidence in mitigation. Consequently, under Payton's own logic, the California Supreme Court's decision that the "catch-all" mitigation instruction did allow for consideration of post-crime evidence in mitigation could not have been contrary to or an unreasonable application of *Boyde*. See *Lockyer v. Andrade*, 123 S. Ct. at 1172-73; *Penry v. Johnson*, 532 U.S. at 794-95. Similarly unavailing is Payton's claim that the California Supreme Court unreasonably determined the facts. Payton's argument demonstrates that he disagrees with some of the California Supreme Court's factual findings, not that the California Supreme Court's determination of the facts was unreasonable within the meaning of the AEDPA.

Because the Ninth Circuit's holding that the AEDPA does not apply to a petition for writ of habeas corpus filed after the AEDPA's operative date where a petitioner filed requests for counsel and stay of execution prior to the AEDPA's operative date conflicts with other circuits and fundamentally alters the standard of review of the state court proceedings, certiorari should be granted.

CONCLUSION

The State's Petition for Writ of Certiorari should be granted.

Dated: March 21, 2003.

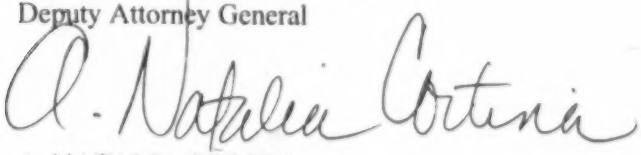
Respectfully submitted,

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